

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

January 26, 2009 Session

MARGARET GAIL MOORE v. MOUNTAIN EMPIRE OIL COMPANY

**Direct Appeal from the Circuit Court for Hawkins County
No. 05CV00461 Kindall T. Lawson, Circuit Judge**

Filed August 14, 2009

No. E2008-02155-WC-R3-WC - Mailed May 12, 2009

In this workers' compensation case, the employee, Margaret Gail Moore, while working as a fuel clerk at a truck stop, was attacked and beaten during a robbery, suffering multiple injuries. Ms. Moore sought permanent disability benefits for physical and mental injuries. She presented testimony of two evaluating physicians, who estimated her total anatomical impairment at 62% to 82% to the body as a whole. The employer, Mountain Empire Oil Company, presented testimony of two evaluating physicians who estimated her impairment to be 14.5%. The trial court awarded 93% permanent partial disability to the body as a whole. The employer has appealed, contending that the trial court erred by basing its award on the testimony of the evaluating physicians presented by the employee.¹ We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and VERNON NEAL, SP. J., joined.

Robert M. Asbury, Knoxville, Tennessee, for the appellant, Mountain Empire Oil Company.

James M. Davis, Morristown, Tennessee, for the appellee, Margaret Gail Moore.

¹ This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Margaret Gail Moore worked as a cashier in the “diesel booth” of a truck stop owned by Mountain Empire Oil Company and located in Greene County, Tennessee. She was assaulted during a robbery on November 14, 2004, and suffered contusions to her face and abdomen, deep cuts, and the loss of five teeth. She was taken to a local emergency room for treatment and was released with instructions to see her primary care physician. Ms. Moore saw her personal physician, Dr. Anita Alwani, a few days later, reporting neck and back pain, knee pain, shoulder pain and headaches. Over time, her headaches worsened and, at Dr. Alwani’s direction, she returned to the emergency room in January 2005. At that time she was diagnosed with a subdural hematoma. She was taken by life-flight helicopter to the University of Tennessee Hospital in Knoxville, where a neurosurgeon evacuated the fluids that had collected inside her skull by drilling two burr holes. The procedure relieved the pressure caused by the hematoma and reduced the severity of Ms. Moore’s headaches. She returned to work approximately two months later.

Ms. Moore testified that she had anxiety whenever she saw someone wearing clothes similar to those worn by her assailant. She was startled by unanticipated noises, and had occasional panic attacks. She stated that she continued to have headaches, though milder than before her surgery, and had developed a constant sound of “crickets” in her ears. Ms. Moore reported difficulties with memory and concentration, specifically with some aspects of operating the computerized cash register in the diesel booth. Those difficulties were confirmed by her supervisor, who testified live at the trial.

Ms. Moore was fifty-eight years old at the time of trial. She attended school into the eleventh grade and has not obtained a General Educational Development diploma. She had worked for Mountain Empire for over fourteen years. Her prior work experience included truck driving, cooking, data entry and managing convenience stores. She had prior medical problems with her knees and lower back, and a number of other medical conditions. She had received anxiety medication for a brief period prior to the robbery. She suggested that this was the result of stress related to her daughter’s divorce.

Dr. Steven Baumrucker conducted an independent medical evaluation at the request of Ms. Moore’s attorney and testified by deposition. Dr. Baumrucker is board certified in family practice medicine, and in hospice and palliative medicine. He is a member of the Medical Impairment Registry of the Department of Labor and teaches at East Tennessee State University in the Family Practice Department. Dr. Baumrucker’s examination of Ms. Moore revealed muscle spasms and a decreased range of motion in the cervical area. Dr. Baumrucker believed that Ms. Moore had chronic neck pain and stiffness as a result of the attack. He assigned 7% anatomical impairment to the body as a whole for this condition. He was also of the opinion that she had developed post-traumatic stress disorder (PTSD) as a result of the incident. Dr. Baumrucker referred Ms. Moore to Dr. Shirley Trentham, a psychiatrist, to evaluate the impairment from that condition.

Dr. Trentham’s diagnoses were PTSD and major depressive disorder. She estimated Ms.

Moore's Global Assessment of Function (GAF) score to be 50, which was "in the middle range." Dr. Trentham testified that Ms. Moore had a Class III, or moderate, impairment according to the Fifth Edition of the AMA Guides. Asked to estimate a percentage impairment based upon the Fourth Edition, she placed Ms. Moore in the "moderately severe" range, which was 55% to 75%. On cross-examination, Dr. Trentham acknowledged that Ms. Moore may have had some pre-existing impairment, and that she had other sources of stress and anxiety not related to her employment.

Dr. Edward Workman, also a psychiatrist, performed an independent medical evaluation at the request of Mountain Empire. His diagnoses were PTSD and post-concussive syndrome. The post-concussive syndrome was a result of the blows to Ms. Moore's head and the hematoma. Its symptoms were short-term memory deficits and difficulty in maintaining focus. Both of these conditions were related to the attack. He assigned an impairment of 5% to the body as a whole for the post-concussive syndrome. He opined that she had a Class II psychiatric impairment under the Fifth Edition. Using a different method than Dr. Trentham, he assigned an impairment of 15% to the body as a whole for PTSD. However, he attributed one-half of this amount to pre-existing psychiatric conditions. He therefore assigned a total impairment of 12.5% to the body as a whole related to the work injury. His GAF for Ms. Moore was 55-60, meaning "that she has some significant neuropsychiatric head injury that includes PTSD." Dr. Workman testified that Ms. Moore had not received adequate psychiatric treatment. He stated that her PTSD might improve somewhat with adequate treatment. The post-concussive syndrome was not likely to improve.

Dr. Robert Finelli, a neurosurgeon, also conducted an independent medical evaluation at the request of Mountain Empire. He testified that his examination of Ms. Moore's cervical spine was within normal limits. In a review of Ms. Moore's medical records, he found only scattered references to neck pain before her independent medical examination by Dr. Baumrucker. She related to Dr. Finelli that she had been told by her treating physicians that there was no treatment for it and, therefore, did not mention it to her doctors again. Dr. Finelli found Ms. Moore's description of her symptoms to be believable and assigned an impairment of 2% to the body as a whole due to Ms. Moore's cervical spine symptoms.

The trial court found that Ms. Moore had sustained an impairment of 62% to the body as a whole for her physical and psychological injuries. It further found that she had a meaningful return to work, and awarded 1.5 times that impairment, or 93% permanent partial disability to the body as a whole. Mountain Empire has appealed, arguing that the trial court erred by basing its award on the impairment ratings of Drs. Baumrucker and Trentham over those of Drs. Workman and Finelli.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony

that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). Where medical expert testimony is presented by deposition, the reviewing court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Mountain Empire contends that the award in this case is excessive, because the trial court relied upon the testimony of the medical witnesses retained by Ms. Moore, rather than that of the medical witnesses retained by it. The extent of vocational disability arising from a compensable injury is a question of fact to be determined by the trial court from all the evidence, including lay and expert testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 335 (Tenn. 2008). Further, when weighing conflicting medical testimony, "it is within the discretion of the trial judge to determine which testimony to accept," Bohanan, 136 S.W.3d at 624 (citing Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers Comp. Panel 1996)), and "he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

Mountain Empire contends that Dr. Baumrucker's testimony is less credible than Dr. Finelli's because Ms. Moore's neck injury is more closely related to Dr. Finelli's specialty, neurosurgery, than Dr. Baumrucker's specialty, family medicine and hospice and palliative medicine. It also argues that Dr. Finelli had access to more complete medical information than Dr. Baumrucker. Ms. Moore responds by pointing out that Dr. Baumrucker is listed on the Medical Impairment Registry (MIR) of the Department of Labor and Workforce Development and maintains an active practice, while Dr. Finelli is not on the MIR and is retired. Both doctors examined Ms. Moore in connection with this lawsuit only; neither is a treating physician. Both used the same section of the AMA Guides to determine Ms. Moore's impairment. The primary difference in their conclusions is that Dr. Finelli thought Ms. Moore had a normal examination of her cervical spine but assigned a 2% impairment due to the pain she described. Dr. Baumrucker based his opinion on her clinical history and his examination findings being compatible with a specific injury. Those findings included muscle spasm with asymmetric loss of range of motion. He quoted from the AMA Guides, Fifth Edition, as supporting his opinion that Ms. Moore fell into the Diagnosis Related Estimate (DRE) Cervical Category II resulting in a 7% whole person impairment. Dr. Finelli also placed Ms. Moore in the DRE Cervical Category II which provides for an impairment of between 5% and 8%. Because of her normal examination, he reduced his impairment rating to 2%. Our review of this evidence leads us to the conclusion that the trial court could have reasonably chosen to accredit the testimony of either doctor. Dr. Baumrucker's explanation of how he arrived at his impairment rating appears

to be well reasoned and, therefore, we are unable to conclude that the evidence preponderates against the trial court's finding on this issue.

Mountain Empire also asserts that Dr. Trentham's testimony is less credible than that of Dr. Workman. It argues that Dr. Trentham was unable to apportion Ms. Moore's impairment between her work injury and pre-existing factors, while Dr. Workman was able to do so. Those factors included family and financial stresses and physical problems unrelated to Ms. Moore's employment. Dr. Workman testified that someone with Ms. Moore's pre-existing personality disorder with paranoid and obsessive traits is much more likely to develop PTSD than someone without her pre-existing disorder. He, therefore, reduced her impairment by one-half to account for the pre-existing condition. He made the reduction even though he indicated Ms. Moore's difficulty in functioning manifested itself after she was attacked. Significantly, both doctors largely agreed concerning the appropriate diagnosis, and did not differ greatly in their assessments of Ms. Moore's level of functioning.

Ms. Moore testified that she had headaches, anxiety attacks, nightmares and short-term memory loss since the time of the assault. These conditions substantially interfered with her ability to engage in many activities of daily living, including her work. This testimony was confirmed in part by the testimony of her supervisor, Bryan Pierce. While there is evidence in the record that Ms. Moore had multiple sources of stress, and had received anti-anxiety medication for a short period of time prior to her work injury, there is no evidence that she experienced any of these problems until after the assault. The evidence clearly supports the conclusion that she has suffered a substantial decline in her ability to function in the world, and that she had a very significant psychiatric impairment. Based upon those factors, we are unable to conclude that the record preponderates against the trial court's decision to use Dr. Trentham's impairment rating as a basis for its disability award.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Mountain Empire Oil Company and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

MARGARET GAIL MOORE v. MOUNTAIN EMPIRE OIL COMPANY

**Circuit Court for Cumberland County
No. 05CV00461**

Filed August 14, 2009

No. E2008-02155-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Mountain Empire Oil Company, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Mountain Empire Oil Company and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Wade, Gary R., J., Not Participating